

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Rules and Regulations Implementing the |) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of 1991 |) | |
| |) | |
| |) | |
| Junk Fax Prevention Act of 2005 |) | CG Docket No. 05-338 |
| |) | |
| To: the Commission |) | |

COMMENTS OF THE MORTGAGE FINANCE COALITION

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SUMMARY

In implementing the Junk Fax Prevention Act of 2005 (JFPA), the Commission should be guided by the fundamental purpose of the statute — to ensure that the Commission’s laudable efforts to protect privacy do not place unreasonable and unnecessary burdens and restrictions on legitimate fax communications within business relationships. Further, to avoid the controversy following its *2003 TCPA Order*, the Commission should not enact any restrictive rules without first making the factual determinations necessary to allow it to fully appreciate the consequences of its actions.

The Mortgage Finance Coalition — which represents nearly all of the institutions and employees in the primary mortgage financing industry — urges the Commission to follow Congress’s lead and strike an appropriate balance between protecting privacy and ensuring that the new rules do not impose unreasonable burdens on industries (like the mortgage industry) that rely on fax communications in their daily business. Specifically, the Mortgage Finance Coalition submits the following recommendations:

- The Commission should adhere to the intent of Congress and first implement the JFPA-added EBR, see how it works in the market, and then make the necessary determinations before it can consider changing the time frame. Precipitous action by the Commission would be inconsistent with the JFPA since the statute directs the Commission to make specific and detailed factual determinations about the JFPA-added EBR before taking any action.
- The Commission should not seek to further define terms that Congress deliberately used, especially parts of the EBR definition that do not lend themselves to being specifically defined. For instance, in light of the numerous ways that private parties can show that a fax number has been “voluntarily made available” — or that a sender has complied with the JFPA’s grandfathering provision — Commission elaboration on these concepts would inevitably be incomplete and could potentially increase litigation risks.
- The Commission should exempt trade associations from the JFPA’s notice requirements with respect to communications with its members. Because members receive substantial benefits from membership in these organizations, and in light of the potential administrative costs, the notice requirements should not be applied in this context.

- The Commission should not impose unnecessary regulatory burdens in implementing the JFPA's notice requirements. More specifically, the Commission should: (1) conclude that a "monthly" response (and not 30 days) is a "reasonable time" to comply with an opt-out request; (2) allow businesses to use e-mail addresses or other low-cost options as their "cost-free mechanism"; and (3) exempt small businesses from the cost-free mechanism requirement (especially if the Commission adopts an expensive mechanism such as a toll-free number).
- The Commission should rule that an opt-out request does not terminate an EBR exemption in the context of a continuing business relationship. Instead, the Commission should rule that a request in these circumstances *suspends* the EBR exemption.

Finally, in enacting its rules, the Commission should recognize that it would be inappropriate simply to cut and paste rules developed in the telemarketing context into this proceeding. Unlike the telemarketing rules, the proposed fax rules govern not only business-to-consumer relationships, but *business-to-business* ones as well. This fact alone raises a distinct set of issues that was not considered in the telemarketing context, thus limiting the applicability of the rules developed in that proceeding.

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COMMENTS OF THE MORTGAGE FINANCE COALITION

The Mortgage Finance Coalition, by its counsel, is pleased to submit these comments on the Commission’s proposed regulations implementing the Junk Fax Prevention Act of 2005 (JFPA).¹ In implementing the JFPA, the Commission should be guided first and foremost by the fundamental purpose of the statute — to ensure that the Commission’s laudable efforts to protect privacy do not place unreasonable and unnecessary burdens and restrictions on legitimate facsimile (“fax”) communications between and among businesses and consumers.² The Commission should also be mindful that the controversy following its *2003 TCPA Order*³

¹ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 199 Stat. 359 (2005) (*JFPA*).

² 151 Cong. Rec. S3280 (Apr. 6, 2005) (statement of Sen. Smith) (“This bill will also help businesses by allowing them to continue to send faxes to their customers in a manner that has proven successful with both businesses and consumers. . . . The effect of the FCC’s rule would be to prevent a business from sending a fax solicitation to any person, whether it is a supplier or a customer, without first obtaining prior written consent. This approach, while seemingly sensible, would impose significant costs on businesses in the form of extensive record keeping.”).

³ Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

resulted from its adoption of new restrictive rules whose potential consequences had not been fully and carefully considered.⁴

The Mortgage Finance Coalition consists of the Mortgage Bankers Association, the National Association of Mortgage Brokers, and the Consumer Mortgage Coalition. With the exception of the government-sponsored enterprises, the Mortgage Finance Coalition represents every segment of the mortgage finance industry and nearly all of the institutions and their employees that are involved in the mortgage financing industry. The Mortgage Finance Coalition and its members actively use fax communications in their daily business affairs.

Consistent with the purpose of the JFPA, the Commission should not enact rules that impose intrusive and unnecessary burdens on important industries (like the mortgage industry) that rely on fax communications. This is especially relevant in light of the fact that the Commission's rulemaking will affect not only business-to-consumer fax communications, but also *business-to-business* communications — a key distinction from the consumer telemarketing context. Finally, if the Commission is inclined to impose any new restrictive rules, it should not act unless and until it has established a well-developed record that allows it to appreciate fully the consequences of any proposed action.

BACKGROUND

As mentioned above, the Mortgage Finance Coalition represents the mortgage industry in the United States. More specifically, the Mortgage Bankers Association represents 2,900 companies including mortgage companies, mortgage brokers, commercial banks, thrifts,

⁴ See S. Rep. No. 109-76, 109th Congress, 1st Sess. 6 (2005) (*Senate Report*) (“[T]he revised junk fax rules . . . would have significant consequences. The cost and effort of compliance could place significant burdens on some businesses, particularly those small businesses that rely heavily on the efficiency and effectiveness of fax machines.”).

Wall Street conduits, life insurance companies and others that support mortgage banking operations. Its member companies employ over 500,000 individuals. The National Association of Mortgage Brokers is the only trade association exclusively devoted to representing the mortgage brokerage industry and speaks on behalf of more than 27,000 members in all 50 states and the District of Columbia. Its members typically maintain business relationships with various lenders to provide consumers with numerous financing options. These partnerships allow the 52,000 mortgage brokerage companies employing over 452,000 employees in the United States to offer consumers the most competitive mortgage products available. The Consumer Mortgage Coalition is a trade association of national residential mortgage lenders, servicers, and service providers, whose members originate and service a substantial portion of mortgages in the United States. The mortgage industry stands out as an important part of our economy and is critical to the long-term health and growth of the housing sector and the economy in general. As a consequence, any Commission rule that imposes unnecessary burdens on mortgage lenders and brokers will likely trickle down to the borrower in the form of higher mortgage costs, less choice in terms, and a less efficient mortgage application process.

ANALYSIS

I. IT IS PREMATURE AND CONTRARY TO THE JFPA TO CONSIDER IMPOSING TIME LIMITATIONS ON ESTABLISHED BUSINESS RELATIONSHIPS AT THIS JUNCTURE

In light of the short deadline imposed by the JFPA, it would be premature and inappropriate for the Commission to consider limiting the duration of an established business

relationship (“EBR”) at this time.⁵ And in light of the specific language of the statute, such precipitous action would be contrary to the intent of Congress. Although the JFPA grants the Commission discretion to limit an EBR’s duration, the statute contemplates a two-step process that must be completed before any limits can be imposed.⁶ First, the statute explicitly requires that, “*before establishing any such limits,*” the Commission must gather detailed information and make factual determinations on four specific issues that pertain to how the JFPA-added EBR exception has affected consumers.⁷ The JFPA provides:

[B]efore establishing any . . . limits [on the duration of the EBR],
the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

⁵ See JFPA, Sec. 2(a). The statute requires the Commission to adopt rules implementing the JFPA within 270 days of its enactment, which is April 5, 2006.

⁶ JFPA, Sec. 2(f).

⁷ *Id.* (emphasis added).

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome. . . .

Only *after* the Commission has completed these factual determinations can it then proceed to the second step and consider whether to limit an EBR's duration in the context of fax communications.⁸

But how can the Commission make any of these determinations when the JFPA-added EBR exception has yet to go into effect? On December 9, 2005, the Commission adopted an Order delaying again the effective date of the “new” (those adopted in 2003) EBR rules pending conclusion of this rulemaking.⁹ As a consequence, the pre-July 2003 rules continue to apply.¹⁰ This action was necessary since, by the terms of the JFPA and its codification within the Communications Act, the EBR exception (and the rest of the statutory requirements) do not become effective until the Commission adopts implementing rules.¹¹ As a result, there is no experience yet with the JFPA-added EBR exception for the Commission to analyze to draw any conclusions. Section 227(b)(2)(G), as amended by the JFPA, requires the Commission to make certain determinations as to how the JFPA-added EBR exception in Section 227(b)(1)(C) is working.¹² It does *not* ask the Commission to analyze how the EBR exception worked from

⁸ *Id.*

⁹ Notice of Proposed Rulemaking and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 05-338, FCC 05-206, ¶ 32 (rel. Dec. 9, 2005) (*Notice*).

¹⁰ *Id.*

¹¹ Section 227(b) provides that “[t]he Commission shall prescribe regulations to implement the requirements of this subsection [i.e., subsection (b)].” 47 U.S.C. § 227(b)(2). The JFPA, however, amends subsection (b) by adding a number of new requirements, including the EBR exception of Section 2(a) of the JFPA (codified at § 227(b)(1)(C)). *See also JFPA*, Secs. 2(c)-2(f). Thus, because these new requirements have yet to be implemented, the JFPA is not yet effective.

¹² *JFPA*, Sec. 2(f).

1992 to 2003. If Congress had intended that to be the test, then it would have written the statute differently, along the lines of Section 2(b) of the JFPA which expressly refers to the EBR rule that existed on January 1, 2003. Instead, what Congress clearly intended was for the Commission to implement the new EBR rule, and then assess how it is working in the market before considering any revisions to the duration. Thus, the Commission would be jumping the gun if it sought to revise the EBR duration at this juncture.

This two-step process reflects sound policymaking. Limiting the duration of an EBR raises a number of complex questions that will have wide-ranging consequences (examples of which will be described below). Thus, it makes sense that Congress would have wanted the Commission to gather extensive facts about how its new law is working before delving again into this area. In requiring the Commission to make these factual determinations, Congress recognized that any time limitations on EBRs would need to be tailored specifically to the unique context of fax communications, just as the FTC telemarketing rules were tailored specifically to the detailed, factual record that the FTC compiled.¹³

In fact, given that the FTC's rules addressed issues unique to the telemarketing context, it would be inappropriate simply to cut and paste those rules into this proceeding, since regulating fax communications raises a distinct set of issues. First, and critically, the JFPA's EBR exception covers *business-to-business* communications as well as business-to-consumer ones. This alone raises a number of questions that the telemarketing proceeding never examined — questions the Commission must grapple with extensively before making any final decision.

¹³ By way of comparison, the Federal Trade Commission (FTC) developed a detailed record prior to enacting the do-not-call registry over a long time period. It began soliciting information about issues relating to the proposed do-not-call registry in early 2000. See Final Amended Rule, 68 Fed. Reg. 4580, 4581 (2003) (*FTC Order*). After gathering extensive facts, it then submitted a Notice of Proposed Rulemaking in 2002 and implemented the rules in 2003. *Id.* at 4581-82.

Second, before imposing any time limitations, the Commission must fully understand the complexities and diversity of business relationships in the affected industries and how those relationships benefit from, and rely upon, fax communications. The mortgage industry alone provides an example of the diverse range of business relationships that the Commission should understand before imposing any arbitrary time limitations on EBRs.

For example, a common form of fax solicitation in the mortgage industry is the “rate sheet,” which lists the prices at which wholesale lenders will purchase loans from mortgage originators. These faxed rate sheets are an effective and efficient way to communicate to mortgage originators the various loan products and interest rates that are available to consumers on any given day. Consumers clearly benefit from this business exchange. The current mortgage business climate does not require a mortgage originator to consistently deliver mortgages to a wholesale lender to maintain a business relationship. In fact, years can often elapse between deliveries of loans to a wholesaler by a particular mortgage originator. Imposing a time limit on the EBR could delay or otherwise restrict the flow of critical information, such as the rate sheet, and would ultimately harm the consumer. In addition, if the Commission were to specify a time limit on the EBR, lenders and brokers would incur unnecessary costs in periodically reviewing their fax distribution lists to cull out obsolete entries, even when most of the numbers on the list fell within the time limit.

We urge the Commission to first complete the inquiry directed by Congress, and to refrain from imposing a time limitation on the EBR at this juncture. Then, the Commission should fully investigate the impact of such a restriction on our industry and other businesses.

II. THE COMMISSION SHOULD NOT IMPOSE UNNECESSARY AND BURDENSOME REQUIREMENTS FOR COMPLYING WITH THE EBR PROVISIONS

A. Defining “Voluntarily”

The Notice seeks comment about whether the Commission should provide a more specific definition of when a recipient has “voluntarily agreed to make available its facsimile number.”¹⁴ While the Mortgage Finance Coalition recognizes that this is an important issue, there is no indication that Congress intended the Commission to expound on this statutory formulation — and with good reason.

The question of what is “voluntarily” made available is necessarily a fact-specific and largely subjective inquiry. Attempting to prescribe rules to govern the multitude of ways that consent can be expressed would be a difficult, if not impossible, task. Further, because questions of what is *voluntarily* made available are essentially questions of subjective intent, the Commission has no special institutional expertise to prescribe definitions in this context.

That said, the Mortgage Finance Coalition understands the Commission’s desire to provide some guidance in this area. If the Commission chooses to act at all, the Mortgage Finance Coalition recommends that it refrain from specifically or restrictively defining “voluntary,” but instead provide a non-exclusive list of “safe harbors” that presumptively satisfy the requirements. These safe harbors could include obtaining fax numbers from the public directory of an organization whose members have joined voluntarily, from signatures or footers in e-mails directed to the sender, or from any publicly available source so long as the sender has a legitimate basis to believe that the source obtained the number voluntarily.

¹⁴ Notice at ¶ 10.

B. Grandfathering Provision

A similar analysis applies to the Notice's question of how the Commission should verify that a sender had both an EBR and the recipient's fax number prior to July 9, 2005.¹⁵ Again, given the diversity of ways that these relationships could be proven, the Commission should not prescribe overly specific record-keeping requirements that would be burdensome and costly, especially for small businesses. Instead, the Commission could strike the appropriate balance between enforcement and flexibility by permitting senders to maintain documents or other evidence in any form that would verify the existence of the EBR prior to July 9, 2005. In fact, senders will already have an incentive to maintain such documentation to avoid private litigation. Thus, the Commission does not need to prescribe specific ways or formats in which the information should be maintained.

III. TRADE ASSOCIATIONS SHOULD BE EXEMPT FROM NOTICE REQUIREMENTS IN COMMUNICATIONS WITH THEIR MEMBERS

The JFPA grants authority to the Commission to allow tax-exempt nonprofit professional or trade associations to send unsolicited fax advertisements to their members in furtherance of the association's purposes without including the opt-out notice on the communication.¹⁶ The Mortgage Finance Coalition urges the Commission to exercise its discretion and exempt certain professional and trade associations from the notice requirements with respect to these communications.¹⁷ The primary reason for applying this exemption is because the EBR between a trade association and its members is substantively different from

¹⁵ Notice at ¶ 11.

¹⁶ JFPA, Sec. 2(e).

¹⁷ Notice at ¶¶ 26-27.

other types of EBRs. When a member chooses to join a trade association, he or she is doing so in order to receive the benefits of that organization. Indeed, one of the strengths of our member associations — and a fundamental reason that people join — is the commonality of member interests in mortgage finance. Members benefit from both the resources and the institutional expertise that their memberships provide, and generally have a vested interest in the information that flows out of our respective trade associations. Thus, given the benefits provided by membership, the Commission should assume that when people join these associations they expect to receive these faxes and thus notice is not required.

IV. THE COMMISSION’S NOTICE REQUIREMENTS SHOULD NOT IMPOSE UNNECESSARY REGULATORY BURDENS

A. “Clear and Conspicuous”

While we understand that the Commission might want to provide guidance about what constitutes a “clear and conspicuous” opt-out notice, we caution the Commission against providing specific definitions or excessively formal requirements (e.g., font size, page location).¹⁸ Similarly to the analysis of what is “voluntary,” the “clear and conspicuous” analysis varies in different circumstances. Accordingly, while efforts to provide guidance may be well-intentioned, they could have the perverse effect of exposing businesses to heightened litigation risks if they fail to conform with needlessly formalistic requirements.

Although the Mortgage Finance Coalition believes that further definition is unnecessary, if the Commission chooses to act, we recommend that it adopt standards similar to the Commission’s MSCM (CAN SPAM) requirements, which state that the “notice containing

¹⁸ Notice at ¶¶ 19-20.

the required disclosures must be clearly legible, use sufficiently large type, and be placed so as to be readily apparent to a customer.”¹⁹

B. “Reasonable Time”

The Notice also seeks comment on the appropriateness of the 30-day limitation period by which senders must comply with a recipient’s opt-out request.²⁰ For the sake of administrative ease and efficiency, we urge the Commission to adopt a 31-day or monthly limitation period. Many of the Mortgage Finance Coalition’s members are small businesses that update their records collectively on the first day each month. If the limitation period were 30 days, these members could inadvertently violate the rule by sending faxes one day too late in months with 31 days. Alternatively, under a 30-day limitation period, these businesses would have to update their records on different days in different months, thereby increasing administrative costs and the chances for error. Changing the limitation to a monthly or 31-day requirement will not burden consumers, but it could reduce compliance costs for businesses.

C. Cost-Free Mechanism

In enumerating the cost-free mechanism that senders must include in the opt-out notice, the Commission should avoid imposing unnecessary costs on businesses. While clearly a toll-free number would qualify as a cost-free mechanism, the Mortgage Finance Coalition recommends allowing other alternatives, including an e-mail or website address. These options would allow recipients to opt-out at any time of the day — at a relatively low cost of compliance for the sender. In addition, if the business is wholly local, providing a local number should also satisfy this requirement.

¹⁹ See 47 C.F.R. § 64.3100(d)(6).

²⁰ Notice at ¶¶ 19-20.

Requiring the maintenance of a toll-free number would impose substantial costs on businesses, especially small businesses and nonprofits, which may have no other reason to have a toll-free number other than compliance with this FCC rule. For a small business that only sends a few faxes a day, the expense of maintaining a toll-free number for that narrow purpose would be unduly burdensome. This is especially true in non-urban areas, where the costs of establishing a toll-free number may be significantly more expensive. Therefore, requiring a local number, e-mail or website address strikes the appropriate balance between consumer ease and burdens on business.

D. Small Business Exemption

The Notice seeks comment on whether the Commission should exempt small businesses from the requirement to provide a cost-free mechanism in the opt-out notice.²¹ We urge the Commission to adopt this exemption, especially if the Commission opts for a burdensome and expensive cost-free mechanism such as a toll-free number. Small businesses have recently been subjected to several new federal regulations including the new telemarketing rules, the CAN SPAM Act provisions, the FTC/FCC monthly registry access rules, and fee increases for access to the National Do-Not-Call registry. The Commission should not impose additional costs on these businesses, especially when those costs are unnecessary to serve the purpose of the cost-free mechanism. Such an exemption would, of course, be less necessary if the Commission concludes that providing a local number, e-mail or website address are appropriate cost-free mechanisms.

²¹ Notice at ¶ 22.

V. THE COMMISSION’S OPT-OUT REQUEST RULES SHOULD NOT IMPOSE EXCESSIVE REGULATORY BURDENS

The Notice seeks comment on whether an opt-out request terminates an EBR exemption if the recipient continues to do business with the sender.²² The Mortgage Finance Coalition urges the Commission not to adopt such a rule. Instead, the Commission should rule that an opt-out in these circumstances *suspends* the ability of the sender to send a fax — it should not terminate the EBR exemption itself. While the Commission notes that opt-out requests terminate EBR exemptions in the telemarketing context, these rules would not be appropriate in this proceeding given that the fax rules govern business-to-business relationships as well.²³

Under the JFPA, it is substantially more difficult for a sender to re-establish a terminated EBR exemption under Section 2(a) than it is for a recipient to rescind an opt-out request under Section 2(d).²⁴ Thus, in the business context, the Commission’s proposed rule would introduce unnecessary inefficiencies into *ongoing* business relationships. Given the high turnover and rapidly-changing needs and demands of business consumers, it is important that senders have the ability to respond quickly and efficiently to new requests of their consumers — and without taking time to ensure the recipient re-completes all the steps initially required to create an EBR exemption. Further, the Commission should recognize that there are market incentives in place to protect against unwanted faxes in this context. Obviously, senders are not going to threaten their ongoing relationships with business recipients by deluging them with

²² Notice at ¶¶ 24-25.

²³ *Id.* at n.60.

²⁴ In contrast to the showings required by Sec. 2(a), Sec. 2(d) provides that an opt-out request is deemed rescinded if, subsequent to the opt-out request, the recipient “provide[s] express invitation or permission to the sender, in writing *or otherwise*.” (emphasis added).

unwanted faxes. In short, these are complex business relationships and are best left settled by the private parties involved.

For similar reasons, the Commission should rule that a recipient's opt-out request expires after a designated time such as five years, which is the period of time that a do-not-call request remains valid under the FTC's telemarketing rules.²⁵ While that proceeding involved substantially different issues than this one, the FTC adopted the five-year period because of the high turnover of telephone numbers.²⁶ Given the number of small businesses that open and close annually, it is likely that the turnover of business numbers is even higher. Thus, in this context, the Commission would be justified in adopting a five-year limitation period (if not shorter).

In addition, the Mortgage Finance Coalition recommends that the baseline rule should be that opt-out requests extend only to the *specific number listed in the request* and not to the entire business from which the request was sent. Any rule that forces senders to look beyond the listed number would impose substantial administrative costs and create widespread confusion. For instance, under such a rule, if a secretary at a major corporation submitted an opt-out request that listed his or her number, the sender would not only have to research all the numbers maintained by that corporation, it would also have to engage in difficult agency law analysis to determine if that particular agent can act on behalf of the entire corporation.

That said, the Commission should recognize that, in many small businesses, multiple individuals may use the same fax number. In these circumstances, the Commission should permit senders to track opt-out requests by number *and name* if they are willing to assume the extra administrative costs. This would allow a fax to be sent to an individual that has

²⁵ *FTC Order* at 4640.

²⁶ *Id.*

not opted out. In these circumstances, granting senders this flexibility will not threaten customer privacy given the market incentives in place for senders not to alienate recipients with whom they have business relationships.

Lastly, the Commission asks whether a sender should be required to honor a request made by mail or e-mail even if such addresses are not necessarily provided by the sender in the facsimile communication's "opt-out" notice.²⁷ We believe that the recipient must honor the specific opt-out communication method provided by the sender in order for the opt-out to be valid. Any other option would create the problem of a finding a "needle in the haystack." Unscrupulous fax recipients could also game the system to extract penalties by purposely sending opt-out requests to addresses not specified for this purpose.

²⁷ Notice at ¶ 25.

CONCLUSION

The Mortgage Finance Coalition appreciates the Commission's desire and efforts to protect consumer privacy, but the Commission should strive to accomplish this objective without imposing unnecessary and unreasonable burdens on businesses that rely heavily on legitimate fax communications. Indeed, one of the overriding purposes of the JFPA is to ensure that the Commission's efforts do not impose such burdens on trade associations and businesses. The recommendations above would allow the Commission to protect consumer privacy while simultaneously avoiding the imposition of excessive burdens that led Congress to pass the JFPA.

Respectfully submitted,

/s/ John Blevins

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